Supreme Court, U. S.
FILED
MAY 1 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1979

No. 79-1731

GIBSON STURGIS, JR.,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

W. E. GORE, JR.
P. O. Box 186
Jackson, Mississippi 39205
Counsel for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

INDEX

Introductory Statement 1

Jurisdictional Statement 2

Question Presented for Review 2

Statement of the Case 2

Reasons for Granting the Writ 3

Argument 3

Conclusion 4

Table of Authorities

CASES

Wilers v. Buckley, 20 Howard (US) 84, 15 Lawyers Edition 816 3

OTHER AUTHORITIES

28 USC 1257 (3) 2

Section 99-17-15 3

Amendment V, United States Constitution 3

In the Supreme Court of the United States

October Term, 1979

No. .....

GIBSON STURGIS, JR.,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

INTRODUCTORY STATEMENT

The Petitioner, Gibson Sturgis, Jr., respectfully petitions for a writ of certiorari to review a judgment and order made by the Supreme Court of the State of Mississippi reported as Gibson Sturgis v. State, Supreme Court No. 51622, affirming a judgment against the Petitioner made and entered by the Circuit Court of the First Judicial District of Hinds County, Mississippi.

The opinion of the Mississippi Supreme Court is appended, bound with this Petition and marked Appendix A.

The decision of the Mississippi Supreme Court was rendered January 30, 1980. The judgment is appended, bound with this Petition and marked Appendix B.

Petition for Rehearing was denied on February 20, 1980. The judgment denying the Petition for Rehearing is appended, bound with this Petition and marked Appendix C.

The Defendant Petitioner is presently incarcerated in the Mississippi State Penitentiary.

JURISDICTIONAL STATEMENT

Petitioner believes this Court has jurisdiction to review the decision by writ of certiorari by virtue of 28 USC 1257 (3).

QUESTION PRESENTED FOR REVIEW

Did the Court err in allowing the amendment to the indictment without entering an order on the minutes?

STATEMENT OF THE CASE

The Petitioner Gibson Sturgis was indicted at the July Term, 1978, by the grand jury of the First Judicial District of Hinds County, Mississippi, on a charge of forgery, the indictment being appended and contained in the appendix marked Appendix D.

On the 22 day of January, 1979, he was tried in the Circuit Court of the First Judicial District of Hinds County, Mississippi, convicted and given a 15 year sentence five years of which was suspended in order to serve 10 years, a copy of said judgment of conviction is contained in the appendix marked Appendix E.

Subsequently, he appealed said conviction to the Supreme Court of the State of Mississippi, which conviction was affirmed on January 30, 1980, and a Petition for Rehearing was denied on February 20, 1980.

The sole point raised by the Petitioner herein, Appellant in the lower Court was that the State of Mississippi amended or attempted to amend the indictment to change the name from Grant Tire Company to Giant Tire Company without an order of the Court being entered on the

minutes before the term ended and contrary to the provisions of §99-17-15 of the Mississippi Code of 1972, which the Petitioner herein and Appellant below argues puts him in the position of being subjected to former jeopardy or double jeopardy, hence this Petition.

REASONS FOR GRANTING THE WRIT

The decision rendered by the Mississippi State Supreme Court is in conflict with the Fifth Amendment of the United States Constitution which holds in part "nor shall any person be subjected for the same offense to be twice put in jeopardy of life or limb; . . ."

ARGUMENT

From the proof of this case and the fact that the Court allowed the District Attorney for the State of Mississippi to amend the indictment put the Petitioner in the position of former jeopardy. We are not unmindful of *Wilers v. Buckley,* 20 Howard (US) 84, 15 Lawyers Edition 816.

It is apparent from the documents shown in the appendix that the Petitioner could be placed in the position of being tried twice for a crime against two corporations and we respectfully submit that certiorari should be granted. The Judgment of Conviction should be reversed and the case be remanded for a new trial upon the proper indictment by the grand jury of the First Judicial District of Hinds County, Mississippi.

CONCLUSION

Petitioner respectfully submits that a review of the record would indicate that this Petition for Writ of Certiorari should be granted and that the judgment by the Mississippi Supreme Court affirming the judgment of the Circuit Court of the First Judicial District of Hinds County should be set aside and the Judgment of Conviction reversed.

Respectfully submitted,

GIBSON STURGIS
By W. E. GORE, JR.
Attorney for Petitioner

W. E. GORE, JR.
P. O. Box 186
Jackson, Mississippi 39205

CERTIFICATE

I, W. E. Gore, Jr., do hereby certify that a copy of the foregoing Petition for a Writ of Certiorari was served on Honorable William Allain, Attorney General for the State of Mississippi, at his usual office address, postage prepaid at the Gartin Building, Jackson, Mississippi.

THIS THE 30th day of April, 1980.

W. E. GORE, JR.

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI
NO. 51,622

GIBSON STURGIS

v.

STATE OF MISSISSIPPI

BEFORE SMITH, WALKER AND BROOM

WALKER, JUSTICE, FOR THE COURT:

The appellant, Gibson Sturgis, was indicted and convicted in the Circuit Court of the First Judicial District of Hinds County, Mississippi, on a charge of uttering and publishing a forged and counterfeit check. From a sentence of fifteen years, five of which were suspended, the appellant appeals.

The state's evidence showed that Michael Carano, an employee of United Tire and Rubber Company, which was a subsidiary of Giant Tire Industries, agreed to sell the appellant Sturgis a quantity of truck tires for the sum of $9,500.00. Pursuant to this agreement, Carano met with Sturgis and one James Puckett, a coindictee, at the Sheraton Hotel in Jackson. At this meeting, a cashier's check drawn on the First National Bank of Jackson and payable to United Tire and Rubber Company, Inc., was delivered by Sturgis and Puckett to Carano. The check made no reference to Giant Tire Industries. The check was signed by one James Hinton, a purported officer of First National Bank of Jackson, and was deposited in a California Bank by Carano but was subsequently dishonered by First National Bank.

The state's evidence further showed that First National Bank had no record of having issued the check and that there had never been anyone employed by First National Bank by the name of James Hinton, the person who purportedly signed the check for the Bank.

At the close of the state's case, the prosecuting attorney made a motion to amend the indictment because it incorrectly recited that Sturgis had uttered a forged check in United Tire and Rubber Co., a division of *Grant* Tire Industries, Inc., a California corporation, while the proof showed that United Tire and Rubber Company was a division of *Giant* Tire Industries, Inc., a California corporation. Over appellant's objection the trial court orally sustained the state's motion to amend the indictment so as to change *Grant* Tire Industries, Inc., a California corporation, to read *Giant* Tire Industries, Inc., a California corporation. No order allowing the amendment was placed on the minutes of the court nor was the indictment physically altered to conform to the proposed amendment.

Sturgis concedes that under Mississippi Code Annotated section 99-17-13 (1972),[1] that the indictment could

---

1. Whenever, on the trial of an indictment for any offense, there shall appear to be any variance between the statement in the indictment and the evidence offered in proof thereof, in the name of any county, city, town, village, division, or any other place mentioned in such indictment, or in the name or description of any person or body politic or corporate, therein stated or alleged to be the owner of any property, real or personal, which shall form the subject of any offense charged therein, or in the name or description of any person, body politic or corporate, therein stated or alleged to be injured or damaged; or intended to be injured or damaged, by the commission of such offense, or in the Christian name or surname, or both, or other description whatever, of any person whomsoever, therein named or described, or in the ownership of any property named or described therein, or in the description of any property or thing, it shall and may be lawful for the court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in

(Continued on following page)

properly be amended to show the correct name of the corporation. However, he contends that since no order allowing the amendment was placed on the minutes of the court that there was in fact no valid amendment to the indictment and consequently there was a material variance between the state's evidence and the indictment. Because of this alleged error, it is urged that the judgment and conviction be reversed.

At common law, an indictment once filed could not be withdrawn for amendment. State v. Springer, 43 Ark. 91 (1884). However, the Mississippi Legislature has enacted what is now Mississippi Code Annotated section 99-17-15 (1972) which specifies the manner in which an indictment may be amended, and it reads as follows:

> The order of the court for amendment[2] of the indictment, record or proceedings provided in section

---

Footnote continued—
his defense on the merits, to order such indictment and the record and proceedings in the court to be announced according to the proof, whenever it may be deemed necessary by the court to amend such indictment, record, and proceedings, on such terms as to postponing the trial, to be had before the same or another jury, as the court shall think reasonable. After such amendment, the trial shall proceed in the same manner, and with the same consequences in all respects, as if a variance had not occurred; but if the court shall, on application, refuse a continuance, the defendant may take a bill of exceptions thereto, and assign such refusal for error.

2. Research reveals the following general law with reference to the amendment of indictments.

(a) It is not required, when the court allows an amendment to be made, that the trial be suspended and court remain at rest while and until the clerk records the order on the minutes. Thomas v. State, 167 Miss. 504, 142 So. 507 (1932).

(b) An amendment to an indictment entered after trial, in vacation, is a nullity. Unger v. State, 42 Miss. 642 (1869); Jones v. State, 279 So.2d 650 at 651 (Miss. 1973).

(c) The Supreme Court has stated that it will not look to the stenographer's notes to determine whether an amend-

(Continued on following page)

> 99-17-13 shall be entered on the minutes, and shall specify precisely the amendment, and shall be a part of the record of said case, and shall have the same effect as if the indictment or other proceeding were actually changed to conform to the amendment; and wherever necessary or proper for the guidance of the jury, or otherwise, the clerk shall attach to the indictment a copy of the order for amendment.

The Court has not strictly adhered to the mandate of the statute that "The order of the court for amendment of the indictment, . . . shall be entered on the minutes. . . ."

In cases where *no objection* was made at trial to the state's motion to amend an indictment, and the court orally allowed the amendment, *and the district attorney made the amendment on the face of the indictment by interlining or otherwise,* and the amendment was not jurisdictional, the Court has held objection could not be raised for the first time on appeal that no order allowing the amendment was put on the minutes of the court. *See* Mahfouz v. State, 303 So.2d 461 (Miss. 1974); Jones v. State, 279 So.2d 594 (Miss. 1973); Richburger v. State, 90 Miss. 806, 44 So. 772 (1907).

On the other hand, the Court has held that where the defendant objects to the state's motion to amend and the objection is overruled and the amendment is allowed by the court but no order allowing the amendment is placed on the minutes of the court, a variance between the in-

---

Footnote continued—

ment has been allowed by the court and made. Crane v. State, 157 Miss. 548, 128 So. 579 (1930). However, a reading of later cases makes is evident that the court, out of necessity to determine whether an objection was or was not made to an amendment, whether the indictment was amended by being physically altered and whether an order was placed on the minutes, does in fact examine the pertinent parts of the entire record on appeal, including the stenographer's notes.

dictment as originally drawn and the proof is fatal, even though the district attorney made the amendment on the face of the indictment. Shurley v. State, 90 Miss. 415, 43 So. 299 (1907); Davis v. State, 150 Miss. 797, 117 So. 116 (1928).

Although the objections interposed in those cases were not directed to the fact that no order was placed on the minutes of the court allowing the amendments, we would point out that in *Jones v. State,* 279 So.2d 594 (Miss. 1973), where the amendment was made on the face of the indictment by striking out the name "Larry" and entering the name "James", this Court said:

> In the trial appellant waived any objection to the amendment, and made no point of the fact that the order authorizing the amendment was not entered upon the minutes of the court prior to actual making of the amendment. He waived his right to urge reversible error so far as the amendment is concerned. The rule is now well established in this state that objections and exceptions, not jurisdictional in nature, cannot be raised for the first time on appeal. Ellis v. State, 254 So.2d 902 (Miss. 1971). (279 So.2d at 595-96).

It is clear from this language that, under the circumstances above presented, a defendant must specifically bring the absence of an order on the minutes of the court allowing the amendment to the attention of the trial court, or the error will be waived and it may not be raised for the first time on appeal.

It is apparent from the foregoing authorities that the attempted amendment to the indictment against the appellant, Sturgis, was of no effect for the reason that there was no order authorizing the amendment placed on the

minutes of the court nor was the amendment made on the face of the indictment.

The state correctly points out, however, that where an attempted amendment to an indictment fails, yet there is no variance between the indictment as it was originally drawn and the proof, there would be no error because the indictment stands good as it was originally drawn. Mahfouz v. State, 303 So.2d 461 (Miss. 1974).

This case falls within that rule. The indictment against Sturgis alleged that he defrauded United Tire and Rubber Company, a division of Grant Tire Industries, Inc., a California Corporation. The check alleged to be forged was physically attached to and referred to in the indictment and was payable to United Tire and Rubber Company, Inc. The recital in the indictment that United Tire and Rubber Company was a division of Grant Tire Industries, Inc., a California Corporation, was merely surplusage and unnecessary since the identity of the company intended to be defrauded was clearly set forth. We have recognized that unnecessary averments or words in an indictment may be treated as surplusage and disregarded. Jones v. State, 279 So.2d 594 (Miss. 1973).

This case also comes within the rule that where a copy of the check charged to be forged and uttered was physically attached to the indictment, that even though there was a slight variance between the indictment and the check, that the case will not be reversed if there is no possibility that the defendant could be again prosecuted for the same offense. *See* Stone v. State, 242 So.2d 127 (Miss. 1970). There is no such possibility in this case.

We are, therefore, of the opinion that although the proposed amendment to the indictment was not effectively made, the indictment as originally written did not require

amendment since the identity of the company defrauded was clearly set forth in the indictment and shown by the check attached thereto. Consequently, the indictment was good as originally drawn. The reference to United Tire and Rubber Company being a division of Grant Tire and Rubber Company, Inc., a California Corporation, was unnecessary surplusage.

We have considered the other points referred to in appellant's brief but find them to be without merit.

The judgment of the trial court is therefore affirmed.

AFFIRMED.

PATTERSON, C.J., SMITH, P.J., ROBERTSON, P.J., SUGG, BROOM, LEE, BOWLING AND COFER, JJ., CONCUR.

APPENDIX B

MINUTES, SUPREME COURT OF MISSISSIPPI
SEPTEMBER TERM, 1979

WEDNESDAY, JANUARY 23, 1980,
COURT SITTING: : : : :

GIBSON STURGIS

#51,622 v

STATE OF MISSISSIPPI

This cause having been submitted at a former Term of this Court on the record herein from the Circuit Court of Hinds County and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the Judgment of said Circuit Court rendered in this cause on the 23rd day of January, 1979-a conviction of UTTERING AND PUBLISHING A FORGED AND COUNTERFEIT CHECK and a sentence to serve a term of FIFTEEN (15) YEARS in the custody of the Mississippi Department of Corrections with Five (5) Years suspended on supervised probation-be and the same is hereby affirmed. It is further ordered and adjudged that the appellant and Allied Fidelity Insurance Company, surety on the appeal bond herein, do pay all of the costs of this appeal to be taxed for which let proper process issue.

APPENDIX C

MINUTES, SUPREME COURT OF MISSISSIPPI
SEPTEMBER TERM, 1979

WEDNESDAY, FEBRUARY 20, 1980,
COURT SITTING: : : : :

GIBSON STURGIS

#51,622 v

STATE OF MISSISSIPPI

This cause this day came on to be heard on Petition for Rehearing filed herein and this Court having sufficiently examined and considered the same and being of the opinion that the same should be denied, doth order that said Petition be and the same is hereby denied.

APPENDIX D

Circuit Court No. P-996

CIRCUIT COURT
July Term, A. D., 1978

FIRST JUDICIAL DISTRICT
OF HINDS COUNTY.

THE STATE OF MISSISSIPPI,)
First District, Hinds County.)

INDICTMENT

(Filed July 7, 1978)

The Grand Jurors for the State of Mississippi, taken from the body of good and lawful persons of the First Judicial District of Hinds County, in the State of Mississippi, elected, impaneled, sworn, and charged to inquire in and for said District, County and State aforesaid, in the name and by the authority of the State of Mississippi, upon their oaths present: That Gibson Sturgis in said District, County and State on the 20th day of January, A. D., 1978 did wilfully, unlawfully, feloniously, fraudulently and falsely then and there utter and publish as true to one United Tire and Rubber Co., a division of Grant Tire Industries, Inc., a California corporation, a certain forged and counterfeit writing on paper an instrument in writing commonly known as and called and purporting to be a certain written and printed bank check and order for the payment of money, of the tenor, purport, effect and in words and figures as follows:

SEE RIDER ATTACHED HERETO

he, the said Gibson Sturgis, then and there well knowing the same to be false, forged and counterfeit, with the wilful

and felonious intent, then and there, feloniously, wilfully, unlawfully and fraudulently to injure and defraud the said United Tire and Rubber Co., a division of Grant Tire Industries, Inc., a California corporation, First National Bank, a banking corporation, and some other person or persons to the Grand Jurors unknown, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Miss.

/s/ Mrs. Hattie Reed
Grand Jury Foreman

/s/ Michael B. Martz
Asst. District Attorney

MINUTES CIRCUIT COURT, 1ST DISTRICT,
HINDS COUNTY
JAN. TERM, 1979

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI
CAUSE NUMBER P 976

STATE OF MISSISSIPPI

VS.

GIBSON STURGIS

SENTENCING OF THE DEFENDANT BY THE COURT

(Filed April 11, 1980)

Now comes the Defendant, Gibson Sturgis, in his own proper person in custody and by counsel, for sentencing for his crime of forgery to which he has been found guilty as charged by a jury verdict at a former day of this Court.

IT IS THEREFORE ORDERED AND ADJUDGED that the Defendant, Gibson Sturgis, for such his crime of forgery, to which he has been found Guilty as Charged by a Jury Verdict, be and hereby is sentenced to serve a term of 15 years in the custody of MDC 5 yrs. suspended on supervised probation 10 yrs. to serve.

SO ORDERED AND ADJUDGED, this 23 day of January, 1979.

/s/ (Illegible)
Circuit Judge